



# INFORMATION

FOR THE

## EARL OF SEAFORTH

Against

Sir JOHN DEMPSTER of *PITLIVER*, and JOHN BAIN  
Younger of *TULLOCH*.

**S**IR *John Dempster* and *Tulloch* having made a great Noise in this Case, and pursued the Design of recovering Payment against the Earl, with a new Address, and by extraordinary Rigors: The Earl takes liberty plainly and fairly to state his Case, that the Lords of His Majesty's Privy Council, and the whole Nation, may be satisfied, that the Management of the Action depending against him, and Design which the Pursuers points at in all this Affair, favours more of an *Intrigue* than a *Legal Process*: But his Lordships Case being in the hands of His Majesty's Privy Council, he is no ways doubtful, but that these Arts will be disappointed, and that his Lordship will obtain the same impartial Justice, as is daily distribute to the rest of the Subjects.

The Earl does not disown, that *Pitliver* did obtain a Decreet against him before the Parliament, and that *Tulloch* did interpose for my Lady his Mother, as an Attestor for her Cautioner; and to his power he never did decline to make satisfaction to Sir *John*, or give Security, or to signify all grateful Acknowledgement to *Tulloch*: But the Endeavours by which *Tulloch* and *Pitliver* have suffered themselves to be engaged, to inveigle the Earl, and obstruct their own payment, without considering that they serve only the Project of others, who design to Ruine and Overwhelm him, is unjustifiable.

And this will appear the more evidently, if your Lordships shall consider the repeated Offers, which the Earl has made to Sir *John Dempster* the Pursuer for his Security. It is known, that the Earl's Estate was left him involved in burden, and that he has never had any access to it, but as it were by Favour: And therefore it is impossible that the Earl can raise considerable Sums of Money upon Demand.

It is also impossible to invent any other way for Sir *John's* Security, but that such of the Earls Friends and Kindred, who are of unquestionable sufficiency should interpose their Credit for him, and that the Earl has offered to Sir *John*, and has shoven the Letters under his Friends Hands to instruct their readiness.

His Friends indeed, tho they were willing to have secured Sir *John*; yet they were not willing to engage themselves to all his Creditors, and therefore they would do nothing untill the Earl was at freedom, lest some new invention might be found while he was prisoner, and in Gripps of some other ill invented Lybel and bold Calumneys to draw them further in, and Sir *John* having rejected that Proposition did not only obstruct his own Payment, but clearly shew that his Adversaries are those who at bottom design the Earl's Ruine. And let Sir *John* fancy to him-

A

self



self what he pleases, the Rigors which the Earl suffers under the pressure of grievous Sicknes and Pain, may well hasten the period of the Earl's Life, but will never advance *Pitlivers* Satisfaction or Security, tho his Lordship should Rott in Prison, and be the single instance of great Severity and Hardship.

As for *Tulloch*: Its true he did very kindly interpose for the Countess Dowager; but still it was but as an attester of a Cautioner, and whereby he can never suffer any Damage: Because what he attested was ~~that~~ the Cautioner was & is sufficient, and enjoys an Estate beyond the Value of the Sum. And his Zeal to Harass the Earl in *this* Matter, does diminish the value of his former good Office.

The Earl does not approve of any violence committed upon any Gentleman, and much less upon *Tulloch*; and it was below him to have done an Action so outrageous, or so foolish, as that whereof he is accused: And it's hardly to be supposed, that any Man of Honour, or Common Sense, will entertain the least suspicion of the Earls accession to it: For besides that the thing was Barbarous and Inhumane of it self, it was foolish and silly in the manner of Execution in the midst of a Burgh Royal, in full Day-light, and without all Design or Prospect.

This being premised; the Lords are intreated to consider, That in the whole Lybel there is not one direct Act of Unjustice or Violence lybelled against the Earl; but a great number of odious Circumstances are so laid together, and sett in such false light, as to give occasion to believe the Earl to have had accessione to the Crimes lybelled: And how far the Pursuers have succeeded in the Probation of this Matter, will afterwards appear.

There is a Petition given in for the Pursuers, Representing their Libel, and that none of the Defenders appeared at the first Diet; but the Earl having afterwards come up, the Pursuer gave in a Petition representing, That no legal Sentence could be execute against his Lordship in his own Countrey: And therefore craving, That before he should be allowed to go home, he might be ordained to find Caution to compear in all the Diets of Process, obtemper the Sentence, and produce the other Defenders who were his Servants. And accordingly the Petition was granted.

It is Answered, That the Earl's not appearing at the Day, being the 4 of January, was occasioned by the Severity of the Winter; and his Lordship came up very shortly thereafter, with the hazard of his Life, notwithstanding of the severe Sicknes and Pain he was under: Which your Lordships thought a sufficient Excuse, and took off the Certification against him. But the Pursuers will never forgive the least failing *in punctilio* to them, at least they are willing to lay hold upon any pretence, to as strange and *unheard of* Reparations.

It is true, your Lordships did indeed grant the Desire of the Pursuer's Petition: But when all the Steps of this Matter are fully under your Lordships View and Consideration, it will appear, That his Lordships has done all that was in his power to give Obedience: And that your Lordships have never decided, That the Earl was directly bound to present persons who were not in his Service, even long before the raising of the Pursuer's Process, and whereof one is dead, and the others (to the Pursuers own Knowledge and Conviction) out of the Kingdom: So that a Caution to present them, would be just, in a manner, to Fine the Earl in an exorbitant Sum for their Fault under, a Gentler Name.

The Pursuers Libel consists of Two Parts, A *Deforcement*, and the *Riot* committed upon *Tulloch* at *Channery*. As to the *Deforcement* (says the Pursuer) he has proven it marvellously; in so far as, first he produces the Messenger's Execution, bearing, That he apprehended the Earl by vertue of a Caption at *Pitliver's* instance, having his  
Bl-



Blazon displaid; but immediatly, he, by the assistance of the other Defenders, did extricate himself; and the Messenger would have pursued him, but he was detained forcibly by the other Defenders, and Beat. 2do. The two Instrumentary Witnesses; viz. William Ross and Donald Bain, depone upon the Verity of the Execution, except as to some small Circumstances, such as, That one of them says, He did not remember the Messenger had any Letters or Papers in his Hand, nor did he see the Messenger lay hold upon the Earl, or intimate to him at whose instance he was Prisoner. And the other Witness depone, That he did not see the Messengers Blazon displaid; and that he did not see the Messenger take the Earl by the Arm. And 3tio. The Deforcement is further proven by the Riot, which was on account of Indignity done to the Earl, and that Tulloch might crave the Earl pardon, and engage never to pursue the Deforcement.

Against the Probation it is objected in the Earl; 1mo. That the Execution of Deforcement is no Probation, unless it be attested by habile Witnesses: And the Messengers Oath would not be received in this Process, where it lybells, that, he directly was injured; and therefore much less can his naked Execution make Faith. 2do. This Execution is not Probative, because it is redargued as false by the Testimonies adduced by the Pursuer himself, such as they are. 3tio. The Circumstances in which the Testimonies vary from the Instrument, are very material; in as far as both Witnesses concurr to disargue that part of the Execution, bearing, That the Messenger took my Lord by the Arm. Whence it clearly follows, that the other part of the Execution bearing, That my Lord did extricate himself by the assistance of the other Defenders; which gives Reason to believe the Matter to have been done by Force, is false: And my Lord never being in the Messengers Hands, he cannot be said to have Extricate himself. And the truth is, the Messenger did neither Intimate the Interest of any Party to my Lord, nor did he offer to detain or hinder him to go to his Boat: And on the other Hand, the Earl did not know, nor did ever approve of the least Rudeness done the Messenger: And William Ross does positively depone, That he did not see any of the Defenders forcibly to have Extricate the Earl out of the Messengers Hands. 4to. It is not proven, that the Messenger intimat Pitlivers Interest, or name so much as his Name. Now that a Party should surrender to a Messenger, just because he says, he is his prisoner, without so much as telling, at whose instance, and for what; is absurd to pretend. It is true, a Messenger needs not read the Letter of Caption, unless he be required: But that he should not so much as Intimate the partys Name, nor the Causes, were to make him too arbitrary. And it were strange to infer a Crime from having nakedly gone away in these Circumstances. 5to. Besides that, he neither laid hold upon the Earl, nor Intimate the Parties interest. It is not so much as proven, that the Blazon was displayed: And Daniel Bain, one of the two Witnesses, depone, He did not see the Blazon displayed: And this at least was essential and necessary: And unless it were proven, there can be no Deforcement sustained. 6to. Of these two Witnesses, one was a Boy, and but just of an Age capable to be a Witness: The other is not only of Tulloch's own Clan and Dependence, but is designed in the Execution his Servant; and therefore he is taken *cum nota* by the Committee.

As to this the Pursuer do pretend, That Bain must be sustained as being testis Instrumentarius, notwithstanding of his being a Servant, and that it was so decided by the Justice Court March 1662 and July 1669 Murray contra French. 2do. Altho he was Tullochs Servant the time of the Deforcement; yet he is not now his Servant, when he is adduced as a Witness. 3tio. Pitliver is properly Pursuer of the Deforcement, and not Tulloch.



It is Answered for the Earl, *1mo.* That Instrumentary Witnesses in Law, are not only Witnesses who sign the Instrument of Nottars as *spécialiter rogati*; but such as sign Witnesses to Subscriptions of Parties: Instrumentary Witnesses as to the Subscription of Parties are Receivable, though they be other ways Inhabile; because the Party does make choise of them to be Witnesses in that Matter, and thereby Renounces the Exception of Inhability: But Witnesses in the Instruments of Nottars ought only to be such as are otherways Habile; because he has in power to renounce the Exception as a Party has. And as to the Decision, that in March 1662, the Parties are not cited: And the Decision *Murray contra French* in the 1669, is indeed cited by Sir George M'Kenzie in his *Criminals*; but the same Author does very fully and plainly redargue it: And he observes, that the Lords of Session upon the 25 July 1663, in an Action of Deforcement concluding Reparation of Civil Interest, did most expressly determine the contrary, and ordain the Deforcement to be proven by most unsuspect Witnesses. Seing therefore, that this Deforcement, which is a Crime, and is severely punishable by our Law, is not at all proven; and any pretence of Probation stands upon Inhabile Testimonies: And seing likewise that Law does require in Cases of deforce, Proofs clear like the Light of the Sun; It is impossible your Lordships will ever sustain this present Deforcement. *2do.* *Bain* being *Tulloch's* Servant at the time of the Execution, he ought not to have been insert as a Witness at all; and his Master's having afterwards apparantly dismissed him on purpose only to qualify him for an Evidence in this proccis, cannot render his Testimony less suspect, that Mystery and Affectation increases the Suspicion: And it is certain he is his Factor, and does attend him in this very Town. And as to the pretence, *That he is not adduced for Tulloch, but for Pitliver, who is Pursuer of the Deforcement.* It is frivolous and vain; for the Council Letters are in name of *Pitliver* and *Tulloch*, as joint Pursuers: And it is evident *Tulloch* for his Relief had got that Caption, imployed the Messenger, and was present at the pretended Deforcement: So that he has most directly an Interest in the Process.

It is true the Testimonies concurr as to some Violence done by Mr. *William Bailly* and *Simon M'Kenzie*, two of the other Defenders. But what is that to the Earl? Have the Witnesses proven, that either he put to his Hand; or ordered them to do it? No, they have not. But the Pursuer pretends, First, *That the Earl did approve of what was done by his Servants, by continuing them in his Service.* Secundo, *That he is in Law, lyable for their Faults.*

It is Answered. This is a pitiful Inference: A Man cannot turn off his Servants betwixt Terms: And the keeping of a Man's Servants for his necessary Use, imports no Approbation of their Faults: And it often happens, that Masters retain their Servants, even when they are guilty of gross and unjustifiable Insolencies, towards persons of far Higher Character than *Pitliver* or *Tulloch*: And yet it were hard from thence to make them Art and Part in their Folly.

The Second part of the Pursuer's Libel is, the Riot committed at *Channery*, where the Earl's part of the Crime is only as accessory Art and Part: But which the Pursuers infer from no Ground of Law; and therefore they do lay the stress of their Cause upon the Laws against the *Highland Chiftains*.

It is proven indeed, *That Tulloch was barbarously used*; which the Earl detests and condemns als much as any Man: But that he was carried to the Earl's House or Closs, is not proven: That there were messages past betwixt the other Defenders and the Earl, the time of the Abuse, is not proven: On the contrary Mr. *Meleod* depones, *That neither the Earl nor his Mother were at home; but were gone*  
some



some Miles off the Town; and that he was told so by my Lady Anna McKenzie my Ladys Sister, Mrs. Margaret McKenzie his Cusine having asked for them at the very time. Nor is the Castle of Channery the place of my Lords ordinary Residence, as William Ross and Baillie McCulloch, and Peter Lamb, Three of the Witnesses, did expressly depone. It is true, it was not marked in their Depositions, tho' the Earl begged it; But the honourable Members of the Committee will not have forgotten it.

In like manner the Pursuer having Interrogat; how long Mr. William Baillie and the other Defenders were continued in the Earls Service; Peter Lamb one of the Witnesses deponed, That he heard the Earl was very displeased at him for what had hapned, and turned him off immediatly thereafter, and that he saw him idle up and down the Country. And tho' this seems very necessary for clearing the Truth, and the Earl's Innocency; yet Pitlivers Procurators would not suffer it to be insert in the Depositions: But the Committee allowed the Earl to attest them in the matter: And the Pursuers are so far convinced, that their Probation is defective; especially as to these Circumstances which load the Earl, that they were fain to excuse it, laying the blame on Witnesses that are Cited and not come; not minding that they have a Warrant to the Sheriff to secure the Witnesses till they should find Caution to appear. But the Pursuers pretend to supply all by Tulloch's own Oath, which how it came in the thought of any Lawier or modest Man, is not Conceivable. But it is like all the other Proposals in their pursute.

The last & greatest Effort is, The Argument to make the Earl lyable for the Fault of his Servants founded upon the 227 Act Par 14. Ja. 6. Appointing Masters and Landlords in the Highlands, to be answerable for their Men and Tenents; and which is extended to the case of publick Peace, and for preserving thereof, as well as to that of Thift, Reiff and Oppression: By the 39 Act of the fourth Session of this current Parliament, the former Laws are extended to the case of the publick peace: And which is already sustained by your Lordships Deliverance upon a Petition 7 July last; and which was likewise practised in the case the Earl of Seaforth against McDonald, in the Tear 1669. Upon which occasion the Council did ordain all Landlords in the Highlands to be lyable for Deforcements committcd on their Ground, unless they deliver up the Offenders.

To this Argument it is answered. *Primo*, That the Laws and Acts of Parliament, whereby Highland Chriistians were made answerable for their Men, did concern only the case of Thift, Roberies, and Depradatione. *Secundo*, They were not simply lyable for the Damages done by them, but being required, they were obliged to find Caution to make their Men Tennents and Servants answerable to Justice, which naturally implys, That they ought to be required to produce them; and is so expressly declared by the 94. Act Par. 11. Ja. 6. and the 227 Act Par. 14. does not Innovat it, but establishes a new and further Security whereby the Masters were obliged to find Caution to make their men Tennents and Servants answerable to Justice: And for that effect the haill persons suspected were to be given into their Masters in Valentines. So that the E. having never been required, so long as his Servants were in his Family, or power, he cannot be lyable now to present them: And all that can be required of him now is, to do exact Diligence to apprehend them, if they be on his Ground, that they may be presented to Justice. And the Earl does produce Instruments upon his intimating to his Tennents and Vassalls to Seise and Apprehend or discover them; as also of his Diligence to search them: And if the Council does not think that he is willing to follow any other Method that shall be prescribed, to signify his willingness to obey, but



require a thing imprestable under a Penalty, and to admit of Evidence of Obedience to excuse it, is upon the Matter a heavy Fine; which its confidently expected the Lords will not establish as a Preparative. 3<sup>to</sup>. As to the 39 Act of the 4 Session of this current Parl: It does indeed extend the former Acts to the case of the publick quiet & peace. But *First*, That Act does furnish a plain Argument for the Earl; for from that Act it appears, that the former Acts did only comprehend the Cases of Thift, Robbery, Oppression and Depredation, and that it required a most special Statute to extend it to the case of the publick Quiet and Peace: *Ergo* the Earl cannot be lawable upon the Ground of the former Acts of Parliament. 2<sup>do</sup>. He cannot be liable by vertue of the foresaid 39 Act, which does not concern the Case of private Injuries or Violencies; But the Act being made in *Anno* 1693, when the *Highlands* were not fully established under the Government, that Act was extended for the Security and Establishment of the Government and publick Peace. 4<sup>to</sup>. As to the instance of the Decision betwixt the Earl of *Seaforth* the Defender's Father, and *M<sup>c</sup>Donald*, with the Ordinance of the Council, That Landlords should be liable for Deforcements upon their Grounds. It is Answered, That it is very questionable how far the Council could extend a Penal Law in the case of Thift, Robbery, and Depredation, to the case of Deforcement, without an Act of Parliament. 2<sup>do</sup>. By that Ordinance of Council, Landlords were only liable for Deforcements upon their Ground; and *it is* neither the Deforcement nor Riot was upon my Lord *Seaforth's* Ground, it being alledged that the Deforcement happened at *Inverness*, and the Riot at *Channery*, both Burghs Royal. 3<sup>to</sup>. The Landlords are not simply made liable for the skaith, but only if they do not deliver the Offender, which must be always understood if the Defender be in their power when required.

And your Lordships would consider not only that Penal Laws are not to be extended rashly *de casu in casum*, that this Decision will concern in the Event and Preparative to the whole Landlords in the *Highlands*, and make them liable not only for their Men, which are their constant dependence, and their Tenents, but for their hired Servants, who serve them one Term, and go away the next, although during the time of their Service they be not required to present them to Justice. This is absolutely New, and in all appearance Landlords may at last be made liable for their civil Debts.

It is true, and the Earl is not ignorant, that when this Pursute was a raising, the Pursuers to load the Earl, and give the better Colour and Rise for any Hardships he should meet with, did disseminate Stories against him, and fill the Minds and Ears of People with Prejudices: But your Lordships are not to be wrought upon in that manner. The Earl cannot doubt that his Case will be considered impartially, setting aside his Quality, he has the Priviledge at least of a Common Subject. And whatever the Pursuers may vainly fancy to themselves, your Lordships will not proceed so, as by the Preparative to expose the rest of the Nation, or have regard to these extrinsick Stories, which neither are, nor ever can be proven. The Nation is now no longer under the Barbarous Maxims, *That a Hair ought to be Hunted, but a Fox to be Destroyed in the Seat*. Your Lordships of Privy Council are in use, and will certainly proceed, according to the Rules of Law and common form.

*It is therefore confidently expected, that your Lordships will Assailzie the Earl from this groundless Complaint, carried on in so extraordinary a manner, as if the Lawes of the Nation were not enough for the Pursuers Security, without new inventions, and to discharge the Earl of his Imprisonment upon this account.*